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No. 06-965

Supreme Court, U.S.
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In The Supreme Court of the United States

THE CITY OF LUBBOCK, TEXAS,
and its MAYOR,

Petitioners,

v.

OSCAR RENDA CONTRACTING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE ISSUES PRESENTED

1. Whether the First Amendment is violated when a government contractor, who did not have a prior relationship with a city, is denied a contract by the city solely because of its First Amendment activity.

2. Whether a complaint is adequate to state a claim under the First Amendment when it alleges that a company was denied a contract by a city solely because of a prior lawsuit that the company successfully pursued against another city in the same state.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Oscar Renda Contracting, Inc., is a privately owned corporation. No publicly owned corporation owns 10 percent or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Oscar Renda Contracting, Inc., hereby opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Appendix A to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Oscar Renda Contracting, Inc. (hereafter, "Renda"), a construction contractor, was rejected for construction of the South Lubbock Drainage Improvements Project, even though Renda was the low bidder by more than $2.2 million (R 10-11; RE 5). The City decided to employ a local construction company solely due to "concerns" that Renda had successfully prosecuted a lawsuit against the El Paso Lower Valley Water District (the "Water District") (R 12-13, 65-85; RE 5).

After an initial lawsuit and nonsuit in state court, Renda filed suit in the federal district court (R 9-30, 86; RE 5), alleging retaliation in violation of the First Amendment, and violations of Fourteenth Amendment liberty interests in reputation, a First Amendment right to petition, and the Texas Local Government Code procurement statutes (R 9-23; RE 5). The City answered and

moved to dismiss Renda's claims, alleging lack of jurisdiction and failure to state a claim (R 36-114; RE 6, 7). Renda filed a response (R 117-350; RE 8), to which the City replied (R 353-90; RE 9), and Renda filed objections and a sur-reply (R 441-54; RE 10, 11).

On May 6, 2005, the district court ordered dismissal of Renda's constitutional claims, for failure to state a claim upon which relief could be granted. Appendix to Petition for Writ of Cert. (hereafter, "App.") at 18, 32-41. The district court also declined to exercise supplemental jurisdiction over Renda's claims asserting violations under the Texas Local Government Code.

Renda filed a timely appeal to the United States Court of Appeals for the Fifth Circuit. On August 31, 2006, the Court of Appeals reversed the district court and held that Renda stated First Amendment claims upon which relief could be granted. App. at 1. The Court of Appeals concluded that Renda's allegation that it was deprived of a contract because of its prior First Amendment activity stated a claim even though it did not have a prior relationship with the City of Lubbock. App. at 7-13. Moreover, the Court of Appeals found that Renda adequately alleged that the speech involved a matter of public concern. App. at 4-7.

STATEMENT OF FACTS

Appellant Renda is a construction company based in Roanoke, Texas, that builds public works projects (R 10-12; RE 5). Appellee, the City of Lubbock, is an incorporated municipality in the Northern District of Texas (*Id.*).

The City required construction of improvements to drain excess storm water, and announced the project for sealed bids pursuant to Chapter 252 of the Texas Local Government Code (R 11; RE 5). Renda submitted the lowest bid by more than $2.2 million (*Id.*). The next lowest bidder was Utility Contractors of America ("UCA"), a local company (R 11, 89; RE 5, 12). The City is required by Texas law to award the contract to the lowest responsible bidder. Tex. Loc. Gov't Code Ann. § 252.043(d)(1) (Vernon Supp. 2005).

Despite the substantial savings that Renda's bid would bring to Lubbock taxpayers, City officials initially recommended that the City award the construction project to Lubbock-based UCA, and not to Renda (R 12-13; RE 5). City officials explained that they knew Renda had previously filed a lawsuit against the Water District and was awarded damages (R 12, 25, 502-523; RE 5). The officials expressed "concern" that Renda was "lawsuit happy" (R 12; RE 5). After Renda met with the City to explain the lawsuit, City officials indicated they had no other concerns about Renda, and that they would be recommending Renda as the contractor for the project (R 12; RE 5).

Despite the City's purported change of heart, Renda was contacted by City officials and required to sign an affidavit as a condition for being awarded the contract (R 13; RE 5). The affidavit, which essentially stated that Renda was aware of the contract's terms and performance requirements, was purportedly drafted by the City Manager's office to assuage fears that the City would be sued by Renda, given Renda's lawsuit against the Water District (*Id.*; R 27-30; 91-92; RE 5, 12). Though the affidavit was not a part of the bidding packet and had never been used in the City's previous construction bids, Renda

complied with the City's demands by signing the affidavit on September 28, 2004, the same day as the City Council vote on the construction project (R 13; RE 5).

When Renda appeared at the City Council meeting on September 28, 2004, the City changed positions again. Despite initial assurances that the City was no longer concerned about Renda's lawsuit against the Water District, and the subsequent affidavit that sought to reduce fears of litigation, the City changed positions a third time and voted to award the construction contract to Lubbock-based UCA (R 14, 90-100; RE 5, 12). Instead of the affidavit's reducing the anxiety of litigation, City Council members seized upon Renda's signing of the affidavit as proof that Renda was not the "lowest *responsible* bidder" (R 13, 25, 90, 100; RE 5, 12) (emphasis added). One City Council member questioned the effectiveness of the affidavit by characterizing Renda as dishonest:

> [T]he City Council's role in awarding bids is to award it to the lowest responsible bidder, and the issue is, are they are responsible bidder, and by the – uh – the actions of the affiant, meaning Mr. Renda's Vice President of that company, and also the recommendations being made, it would indicate there's questions whether they are responsible. *And that's kind of like asking a bank robber, do you swear you won't rob any more banks?* And that's the issue right there, I believe.

(R 13, 93; RE 5, 12) (emphasis added).

The basis for suggesting that Renda was dishonest stemmed from beliefs regarding the Water District lawsuit (R 13-14; RE 5). City Council members further supported their opposition to Renda's bid by making comments regarding Renda's "threatening suits all the time," and

suggesting that "the word's already starting to get out" about Renda's litigation (R 97-98; RE 12). The statements regarding Renda were also made at the same time and in the same context as discussion that "another out-of-town contractor" had recently sued the City in a contract dispute (R 98-99; RE 12). By a 4-3 vote, the City ignored Renda's bid and awarded the contract to UCA (R 14, 99-100; RE 5, 12).

Despite attempts by Renda to avoid litigation against the City, Renda submitted a request for reconsideration and appeared before the City to plead that the City engaged in improper conduct by denying Renda's bid because of the Water District litigation (R 14; RE 5). Nevertheless, the City Council re-approved its decision not to contract with Renda by a 4-2 vote, with one City Council member not participating (R 14, 26; RE 5, 12).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS FOLLOWED CLEARLY ESTABLISHED LAW FROM THIS COURT IN HOLDING THAT A PRIOR RELATIONSHIP WITH A CITY IS NOT A PREREQUISITE FOR A CONTRACTOR BEING ABLE TO SUE A CITY FOR RETALIATION FOR SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Court of Appeals held that Renda stated a claim upon which relief can be granted because it alleged that it had been denied a valuable contract by the City of Lubbock in retaliation for its prior First Amendment activity.

It is well established that the filing of a lawsuit is a form of political expression protected by the First Amendment to the United States Constitution. *NAACP v. Button*, 371 U.S. 415, 429 (1963). There is no dispute between the parties to this lawsuit that Bendix was denied the contract by the City solely because of its prior litigation against another city.

In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), this Court held that the First Amendment protects government contractors from retaliation for their speech activities. The Court of Appeals relied on this decision and concluded: "The [Supreme] Court's analysis in *Umbehr* leads us to conclude that the Court would not require a contractor to have a prior relationship with a governmental entity before being able to assert a First Amendment claim and the district court erred in dismissing the suit on this ground." App. at 13.

Although this Court in *Umbehr* did not decide whether a prior relationship is required for a contractor to bring a retaliation claim, other decisions have made it clear that no such relationship is required. For nearly a half-century, this Court has held that the government may not deny individuals valuable government benefits in retaliation for the exercise of freedom of speech. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958).

In *Umbehr* and *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712 (1996), this Court analogized the First Amendment rights of government contractors to those of government employees. *Umbehr* and *O'Hare Trucking* must be understood as part of an unbroken sequence of cases that protect government employees and independent contractors from reprisal because of speech

and political activities. *See, e.g., Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

This Court has held in the government employment context that no prior relationship is required before an employee is permitted to assert a claim for First Amendment retaliation; a refusal to hire an employee in retaliation for engaging in protected activity violates the First Amendment. In *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990), this Court explained that the protection from political patronage is to "prevent[] the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." In *Rutan*, this Court expressly rejected the idea that the First Amendment protects only those who have had a prior relationship with the government entity; prospective employees also are protected from being harmed because of their speech and political activities.

Nor is there any logical reason why the First Amendment should be limited to those who have had a prior relationship with the government entity. Any retaliation for First Amendment activity is impermissible. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (retaliation for speech violates the First Amendment).

Petitioner is correct that the Court of Appeals decision in this case conflicts with a contrary decision of the Third Circuit in *McClintock v. Eichelberger*, 169 F.3d 812 (3d Cir. 1999). But it is important to note that is the only other Court of Appeals case to consider the issue of whether a prior relationship is necessary for a contractor to have a

First Amendment claim for retaliation. None of the other Courts of Appeals' decisions cited by Petitioner dealt with this issue. In other words, in the decade since *Umbehr* only two Circuits have faced the question of whether a preexisting relationship is necessary for a contractor to have a claim under the First Amendment. This is hardly the type of Circuit split or issue of national importance warranting attention from this Court.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND BECAUSE THE LAW IS CLEARLY ESTABLISHED THAT THE COMPLAINT ADEQUATELY ALLEGED THAT THE SPEECH INVOLVED A MATTER OF PUBLIC CONCERN.

The second issue presented in the Petition is whether Renda "sufficiently pleaded allegations" that its First Amendment activity involved a matter of public concern. It is crucial to note that both the question presented and the analysis in the Petition focus on the adequacy of the allegations in the pleading.

There is no split among the Circuits and no uncertainty in the law as to the pleading requirements here. Nor is there basis for questioning the Court of Appeals' holding that the allegations in the complaint were sufficient to withstand a motion to dismiss for failure to state a claim.

Several paragraphs of the Complaint allege that Renda was denied the contract by the City of Lubbock because of speech protected by the First Amendment. Specifically, Renda alleged that it was denied a contract by

the City of Lubbock because it had previously successfully sued the City of El Paso after it was repeatedly asked to engage in illegal activity by government officials there.

Paragraph 32 of the Complaint states: "Utilizing the court system to redress a federally protected right is activity protected by the First Amendment to the United States Constitution." Paragraph 34 states: "The City clearly relied upon and used ORC's protected activity, the El Paso litigation, and retaliated against ORC by not awarding ORC the Project/Contract. . . ." Paragraph 35 states: "The City retaliated against ORC because ORC engaged in federally protected activity, specifically utilizing the court system to redress violations of federally protected rights, which is a violation of federal law." Paragraph 37 states:

> The City of Lubbock has a custom, practice, or policy of violating the Texas Local Government Code procurement statutes and committing retaliation for engaging in activity that is protected by the United States Constitution. The decisions, which form the basis for this lawsuit, were made by the Highest-Ranking-Official-Policy-Making Authority of the City of Lubbock, which is the Lubbock City Council. Therefore, the decision to retaliate against ORC because . . . ORC had engaged in protected activity, became the policy of the City of Lubbock.

The Complaint is clear as to the specific protected speech activity that was alleged to be the basis for the retaliation by the City of Lubbock: the prior lawsuit by the plaintiff against the City of El Paso. Paragraph 17 of the Complaint, for example, describes Renda's prior suit against El Paso, the verdict in Renda's favor, and the Court of Appeal's affirming of this verdict.

By alleging that the defendants acted improperly by denying Renda the contract because of its prior litigation and that this was protected speech activity, Renda met the requirement for alleging that the speech was a matter of public concern. Litigation is inherently a matter of public concern, particularly where it involves allegations of wrong-doing by government officials. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983) (matters are of public concern which can "be fairly considered as relating to any matter of political, social, or other concern to the community."); *Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994) ("There is perhaps no subject of 'matters of public concern' more important than bringing official misconduct to light.")

Put another way, speech by government employees and contractors is protected if it involves a matter of public concern. By claiming that Renda was denied a contract because of protected speech, specifically the El Paso litigation, Renda's Complaint made clear that it was alleging that the speech was of public concern.

There, of course, is no need for plaintiff to have specifically included the phrase "public concern" in its complaint. All that is required under the Federal Rules of Civil Procedure is that the plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002). A case is to be dismissed "only if it is clear that no relief can be granted *under any set of facts that could be proved, consistent with the allegations.*" *Id.* at 514 (emphasis added). *See also Conley v. Gibson*, 355 U.S. 41, 45-46 (1959) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

claim which would entitle him to relief.") Certainly, if plaintiff proved its allegations – that it was denied a contract because of protected speech – it would be entitled to relief.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 517 U.S. 163, 168 (1993), this Court reaffirmed that "the Rule [of Civil Procedure] meant what it said: '[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"

The litigation in the District Court shows that the court and the defendants had notice of the circumstances of the claim and specifically knew that plaintiff was alleging that the speech was of public concern. Defendant moved to dismiss, in part, by arguing that the speech did not involve a matter of public concern. Plaintiff addressed this expressly and argued that the speech was of public concern because the First Amendment activity involved litigation concerning misconduct by government officials.

The Petition identifies no split in the Circuits as to the standard for determining the adequacy of the complaint. The Court of Appeals correctly held that the complaint alleged that the retaliation was for speech that was a matter of public concern. There is no basis for certiorari on this issue.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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